TENAGA NASIONAL BHD

v.

BAN HENG RICE MILL (1952) SDN BHD

HIGH COURT MALAYA, ALOR SETAR
ZAMANI RAHIM JC
[CIVIL SUIT NO: 22-173-2002]
10 MARCH 2010

PUBLIC AUTHORITIES: *Electricity - Charge for supply - Under-billing - Power of supplier to charge consumer amounts not billed or under-billed - Statutory jurisdiction - Licensee Supply Regulations 1990, r. 11(2) - Whether amenable to estoppel - Whether negligence constitutes a defence to a statutory obligation - Contractual obligation between supplier and consumer*

This was a claim by the plaintiff, an electricity provider, for the sum of RM1,868,259.30, being the amount it under-billed the defendant from 27 July 1995 to 24 May 1999. The claim was resisted by the defendant on the grounds that it was not aware of the under-billing, that the plaintiff was negligent and that plaintiff was estopped from making the claim. The plaintiff's claim was premised upon rr. 3(1) and 11 of the Licensee Supply Regulations 1990 ('the Regulations'), r. 11(2) of which provides that "should the supply registered by the meter at any time is not equal to the energy consumed or the meter is not registering the actual consumption due to faulty installation, the licensee may make a charge for the supply of energy."

Held (allowing the plaintiff's claim):

(1) By virtue of r. 11(2) of the Regulations, the plaintiff clearly has an unrestricted right to claim for under-billing. Additionally, there is also a contractual basis to the plaintiff's claim pursuant to cl. 11 of the contract entered into between the plaintiff and the defendant on 9 February 1980. (paras 7 & 8)

(2) The mistake in the billing was caused by the plaintiff using the wrong multiplier. That did not, however, relieve the defendant of its liability under r. 11(2) of the Regulations or under contract. Besides, negligence is a cause of action and not a defence; hence, it did not apply here. (para 9)

(3) The plaintiff's claim was based strictly on the Regulations. There can be no estoppel against the operation of a statutory provision. (para 15)

[Plaintiff's claim for sum of RM1,868,259.30 allowed; interest at 8% per annum amounting to RM1,120,341.06 as at 10 February 2010 and continuing at daily rate of RM409.48 until settlement. Defendant's counterclaim dismissed.]

Case(s) referred to:

Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd [2009] 1 CLJ 221 CA ***(refd)***

Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal [2001] 2 CLJ 344 CA ***(refd)***

Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors [2006] 2 CLJ 1 FC ***(refd)***

Public Textiles Berhad v. Lembaga Letrik Negara [1976] 1 LNS 120 FC ***(refd)***

Tan Yeong Kim lwn. Tenaga Nasional Bhd [2000] 8 CLJ 629 HC ***(foll)***

Taranaki Electric - Power Board v. Proprietors of Puketapu 3A Block, Incorporated [1958] NZLR 297 ***(refd)***

Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd [1998] 2 CLJ 740 CA ***(foll)***

Tenaga Nasional Bhd v. Teck See Plastic Sdn Bhd [2007] 9 CLJ 161 HC ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 60

Licencee Supply Regulations 1990, rr. 3(1), 11

For the plaintiff - WL Lam; M/s Skrine & Co

For the respondents - Karanjeet Kaur; M/s Ban Eng, Annual & Foong

Reported by Gan Peng Chiang

JUDGMENT

Zamani Rahim JC:

The Plaintiff's Claim And Its Basis

[1] The plaintiff's claim is for RM1,868,259.30 interest and costs. The sum RM1,868,259.30 represents the amount under billed for the period 27 July 1995 to 24 May 1999. The facts that this sum was mistakenly not billed is not disputed by the defendant. Instead, the defendant's position appears to be that the defendant is not liable to pay because of the following factors:

(i) The plaintiff was negligent,

(ii) The plaintiff is estopped from claiming, and

(iii) The defendant was not aware of underbilling.

[2] The defendant has also raised a counter claim.

The Basis Of The Plaintiff's Claim

[3] The plaintiff's case is based on rr. 3(1) and 11 of the Licensee Supply Regulations 1990 which provides as follows:

> Rule 3(1)
>
> (1) A licensee may recover from a consumer any charges due to him in respect of the supply of electricity, or in respect of the supply and fixing of any electricity meter, supply line or electrical equipment.
>
> Rule 11(1)
>
> (1) The licensee shall provide and fix such meters as it considers necessary for the measurement of the supply of energy to a consumer. Where additional meters are installed by the licensee at the request of the consumer the charge as determined by the licensee shall be paid by the consumer.
>
> Rule 11(2)
>
> (2) The reading of the consumer's meter shall be *prima facie* evidence of the amount of electrical energy consumed, provided that should the supply registered by the meter at any time is not equal to the energy consumed or the meter is not registering the actual consumption due to faulty installation, the licensee may make a charge for the supply of energy. (Emphasis added)
>
> Rule 11 (3)
>
> (3) In the event that the supply of meters at any time is not equal to the demand, the licensee may make a fixed monthly charge for the supply of energy.

[4] It is to be noted that the Licensee Supply Regulations 1990 have been amended pursuant to P.U.(A)489/2002. These amendments do not affect the claim herein, which arose before the amendments came into effect.

[5] The effect of these provisions has been considered in *Tenaga Nasional Bhd v. Teck See Plastic Sdn Bhd* [2007] 9 CLJ 161. That too was a case where the plaintiff made a claim based on under billing. The High Court referred to the above provisions and held that:

A Therefore it can be concluded that the Licensee Supply Regulations 1990 permits the plaintiff to raise a claim against the defendant for the amount undercharged for the supply of electrical energy as stated in similar unreported High Court case of *Hock Seng Company Sdn Bhd v. Tenaga Nasional Berhad* [2000] MLJU 571 it was held

B Oleh itu, menurut peruntukan Peraturan-Peraturan Bekalan Pemegang Lesen 1990 Peraturan [khasnya Peraturan (3) dan (12)] defendan adalah berhad terhadap caj tambahan bagi penggunaan tenaga elektrik yang tidak atau gagal direkod dan plaintif tidak boleh mengatakan atau menimbulkan alasan bahawa defendan diestop daripada menuntut bayaran bagi
C penggunaan elektrik yang tidak direkod.

[6] In another decision of the High Court, *Tan Yeong Kim lwn. Tenaga Nasional Bhd* [2000] 8 CLJ 629, Alauddin Mohd Shariff J (as he then was) held that:

D Tambahan lagi plaintif juga terikat dengan syarat-syarat yang terkandung di dalam kontrak bekalan yang ditandatangani dengan defendan di mana jelas diperuntukkan melalui klausa 11 bahawa plaintif hendaklah mematuhi Akta dan peraturan-peraturan yang dibuat di bawahnya.

E Kini plaintif tidak boleh mempersoalkan kuasa yang diberikan kepada defendan berhubung pemotongan bekalan dan seterusnya kuasa defendan menuntut bayaran-bayaran yang dikenakan terhadap plaintif apabila defendan membuat kiraan semula jumlah penggunaan elektrik yang sebenarnya. Dakwaan plaintif bahawa pengiraan semula yang dibuat defendan adalah satu 'guesswork' pada pendapat saya merosot
F sama sekali kerana pengiraan semula tersebut sebenarnya bersandarkan kepada ujian ketepatan yang dilakukan oleh defendan dan ini tidak dinafikan oleh plaintif. Jadi, menurut peruntukan Peraturan-Peraturan Bekalan Pemegang Lesen 1990 (khasnya seksyen 3, 11 dan 12) defendan adalah berhak terhadap caj tambahan bagi penggunaan
G elektrik yang tidak atau gagal direkodkan.

[7] There is also a contractual basis for the plaintiff's claim under cl. 11 of the contract entered into between Lembaga Letrik Negara and the defendant on 9 February 1980 (hereinafter referred to as "the contract").

H **[8]** It is thus clear that the plaintiff has an unrestricted right to claim for underbilling.

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The Source And Causes Of The Problems And The Plaintiff Was Negligent

[9] It is clear that the reason why the wrong multiplier was used was the plaintiff's mistake. However, it is also clear that this mistake does not relieve the defendant of liability. The defendant submits at part C para 5 of its submission, *inter alia*.

> The Plaintiff cannot deny that it owe the Defendant a duty to take reasonable care. The Plaintiff had breached that duty. As a result of that breach, the Defendant has suffered damage and the damage suffered is not too remote.

[10] It thus appears that the defendant is asserting a defence based on the tort of negligence.

[11] The plaintiff submits that the answer to this is there-fold:

i) Negligence is a cause of action, and not a defence,

ii) The relationship between the parties is governed by statute (the Licensee Supply Regulations 1990) and the contract. In such circumstances, concepts of tort do not apply. See *Lim Soh Wah & Anor v. Wong Sin Chong & Anor & Another Appeal* [2001] 2 CLJ 344 where the following passage was cited with approval:

> A concurrent or alternative liability in tort will not be admitted if its effect would be to permit the plaintiff to circumvent or escape a contractual exclusion or limitation of liability for the act or omission that would constitute the tort.

[12] The same principle was applied in *Bank Utama (Malaysia) Bhd v. Insan Budi Sdn Bhd* [2009] 1 CLJ 221. In this case, the contract operates to negative any liability on the part of the plaintiff. Note 1(c) of this reads as follows:

> Lembaga tidak bertanggungjawab terhadap apa-apa kehilangan atau kerosakan yang disebabkan atau berbangkit dari apa-apa kecacatan pada pepasangan dan apa-apa ujian yang dijalankan oleh Lembaga adalah bagi kepentingan Lembaga sahaja dan tidak boleh disifatkan ada apa-apa waranti bahawa pepasangan itu sesuai bagi maksud penggunaan ataupun x ia mematuhi sepenuhnya Peraturan-peraturan Letrik atau Kaedah-kaedah (Bekalan Lembaga) Letrik.

[13] Even if the defendant were able to establish a duty of care in tort, the nature of the loss allegedly suffered by the defendant is economic. Such loss is generally not recoverable in the tort of negligence. This aspect was considered in *Teck See*, *supra* where the court held:

> It is clear in this case that the defendant has not proven actual damage which is an essential ingredient in the tort of negligence and thus fails to prove negligence on the part of plaintiff towards the defendant. This can be seen in the case of *JR Munday Ltd v. London C.C.* [1916] 2 KB 331 where it was held that Negligence alone does not give a cause of action; the two must co-exist.

[14] In *Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors* [2006] 2 CLJ 1, the Federal Court held that pure economic loss should be recoverable only in limited circumstances.

Damage And Estoppel

[15] The defendant asserts that the plaintiff is estopped from claiming against the defendant. The answer is this. The plaintiff's claim against the defendant, as earlier stated, is based on a statute that is, the Licensee Supply Regulations 1990 and there can be no estoppel against the operation of a statute. In *Public Textiles Berhad v. Lembaga Letrik Negara* [1976] 1 LNS 120 where it was held by the Federal Court that.

> It will be seen that the cases referred to above are concerned with the proposition that we cannot avoid our statutory duties in the face of an estoppel. It is our bounden duty to obey the law which is enacted in the interests of the general public or a section of it. In other words, in cases where the doctrine of estoppel has been excluded it is because to have decided otherwise would have allowed a person to achieve by an estoppel against himself something which he could not otherwise lawfully do.

[16] As to the defendant's submission in part D, para 4, it is clear from the cross examination of SD1 that he could not remember for what period the defendant had carried out an examination of the plaintiff's bills, had the defendant done properly, it would have spotted the error.

[17] The defendant's submission in part D, para 5 that "SD1 was not cross-examined on D30 paras. 13 and 14" is unsustainable in the light of the notes of proceedings at p. 40 as follows:

Put: The defendant did not rely on any representation from TNB (plaintiff)

A: I disagree.

Put: No representation made by TNB to the defendant as alleged by you.

A: I do not agree.

[18] In any event, it is clear that the defendant did not act in reliance on any representation by the plaintiff, and that the justice of the case in fact requires that the defendant should pay the plaintiff for the electricity which it had used.

[19] The case of *Taranaki Electric - Power Board v. Proprietors of Puketapu 3A Block, Incorporated* [1958] NZLR 297 offers a useful example of when a claim in estoppel will be allowed. In that case, the defendant suspecting that it was being unbilled, made repeated enquiries of the local electricity board, asking whether the metering was correct. Each time, they were told that the metering was correct.

[20] In this case, no such enquiries were ever made, and the defendant's own case is that it was unaware that its electricity costs had been halved.

[21] The case of *Tenaga Nasional Bhd v. Perwaja Steel Sdn Bhd* [1998] 2 CLJ 740 is of no relevance to the present situation. In that case the credit notes given by the appellant were used to found an estoppel. No similar representation was made in this case.

[22] It is thus clear that no estoppel arises in this case.

Whether The Defendant Was Aware Of The Underbilling

[23] It is mischievous for the defendant to submit that "the plaintiff suggested and attempted at length to show that the defendant was all along (at least since 1996) aware of the plaintiff's erroneous underbilling."

[24] As to the defendant's submission paras. 2 - 8, it is clear that SP1 could not give any precise breakdown of the other expenses. As has been said, the evidence shows the defendant either did not know of, or knew and kept silent about the increased electricity costs.

[25] The plaintiff's contention that only two explanations exist for the defendant's conduct:

i) either it did not notice that its electricity costs had been cut in half because electricity was not an important cost element which required to be monitored, or

ii) it was aware that its electricity cost had been cut in half, and choose not to alert the plaintiff of this.

[26] It matters not which explanation is correct because neither serves to create a factual basis for any defence to the plaintiff's claim, let alone a basis for counterclaim. To hold otherwise in effect be to say that the plaintiff's mistake has given the defendant a perpetual right to half price electricity.

[27] Viewed in this conduct, what the defendant is asserting is that it is entitled to rely on representation which it was never aware of, in order to create an estoppel which will allow it to avoid its statutory obligation. This is clearly an unsustainable assertion.

The Defendant's Counterclaim

[28] The evidence of SD2, must be disregarded. It is clear from his cross-examination that he has no personal knowledge of the matters which he testified to. As such, his evidence must be discounted pursuant to s. 60 of the Evidence Act 1950.

Conclusion

[29] In the final analysis, the plaintiff has proved the fact of underbilling. The defendant has not shown any defence. In fact what is shown is that the defendant has had the benefit of half-price electricity.

[30] The plaintiff's claim is hereby allowed in the sum of RM1,868,259.30 together with interest thereon at 8% per annum, amounting to RM1,120,341.06 as at 10 February 2010 and continuing at a daily rate of RM409.48 up to the date of settlement. Cost of this action is awarded to the plaintiff. The defendant's counterclaim is therefore dismissed.